United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7346

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P/S

In the

United States Court of Appeals

For the Second Circuit

Tradax Limited; Nitrovit Limited; Joseph Rank Ltd.; Reason & Busby Ltd.; T.D. Bailey Ltd.; Hudson Ward & Co. Ltd.; Barker, Lee, Smith Ltd.; Whittens Ltd.; General Freight Co. Ltd.; and BOCM Silcock Ltd.,

Plaintiffs-Appellants,

—against—

M.V. "HOLENDRECHT",
her engines, boilers, tackle, etc.,

—and against—

N.V. Stoomvaart Maatschappij De Maas and
Phs. Van Ommeren, N.V.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

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Issues Presented for Review

1. May an appeal be taken to the United States Court of Appeals which seeks to reverse an order of the United States District Court merely staying a lawsuit pending arbitration in an Admiralty and Maritime matter?

2. May vessel owners require a holder of a bill of lading to arbitrate claims, pursuant to a specific arbitration clause in the bill of lading?

3. May an appellant raise on appeal an argument which it did not raise in the proceedings in a lower court?

4. May a party to a contract containing an arbitration clause require that the terms of the clause be determined by a court of law or should such interpretation be left to the arbitrators?

Statement

This is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure and is within the admiralty and maritime jurisdiction of the United States District Court for the Southern District of New York.

The plaintiffs-appellants contend that the vessel M.V. HOLENDRECHT, which was owned and operated by the defendants-appellees, was unseaworthy in that on its voyage from Philadelphia, Pennsylvania to Hull, England, the hatch cover of the number 1 hatch was breached, when the vessel encountered severe heavy weather in the nature of a peril of the sea.

The plaintiffs-appellants have filed a complaint stating that they are the holders-in-due-course of two bills of lading (A15, A17) for two portions of a shipment of corn in bulk.

The defendants-appellees duly answered the complaint of the plaintiffs-appellants and promptly demanded arbitration of the claim.

The defendants-appellees then moved by Notice of Motion to Honorable Kevin Thomas Duffy for an order staying

the lawsuit pending arbitration pursuant to the terms and conditions of the bills of lading sued upon.

Judge Duffy held on June 22, 1976, that the defendants-appellees had the right to demand arbitration and had granted a stay of the lawsuit pending such arbitration and further placed the matter on the Court's Suspense Calendar. The Judge also determined that any questions as to whether or not the claim of the plaintiffs-appellants was time-barred pursuant to the particular arbitration clause was a matter to be resolved by arbitrators.

Judge Duffy had before him, at the time of his decision, the affidavit and memorandum of law accompanying the Notice of Motion of the defendants-appellees, as well as the affidavit in opposition and memorandum of law in opposition of the plaintiffs-appellants. No oral argument was ever requested.

The order of Judge Duffy, made pursuant to the Notice of Motion in an admiralty and maritime matter, is not a final order nor is it an injunction within the meaning of 28 U.S.C., 1291; 1292, and there is no jurisdiction for an appeal. Indeed, the plaintiffs-appellants fail to state any jurisdictional basis for the taking of this appeal.

Facts

On or about June 30, 1975, the plaintiffs-appellants commenced a lawsuit in the United States District Court for the Southern District of New York (A3) to recover for alleged damage to two shipments of corn in bulk carried aboard the M.V. HOLENDRECHT from Philadelphia, Pennsylvania to Hull, England under two bills of lading (A15, A17), both dated February 6, 1973. These bills of

lading were contracts for the carriage of 148,600.00/56 bushels and 20,000.00/56 bushels of corn respectively.

The shipments were loaded aboard the M.V. HOLENDRECHT in bulk. Each bill of lading, signed by Lavino Shipping Company, as agents for the master, states on its face:

> ALL TERMS, CONDITIONS AND EXCEPTIONS AS PER CHARTER PARTY DATED LONDON DECEMBER 18, 1972 TO BE CONSIDERED AS FULLY INCORPORATED HEREIN.

Each further contained on its obverse side the following language at clause 10:

> "All terms, conditions and provisions of the Strike, Lighterage Clause No. 26 and Arbitration Clause of the 'Centrocon' charter party to apply."

The charter party (A19) referred to on the face of the bills of lading contains the following clause with respect to arbitration:

> 'CENTROCON' ARBITRATION CLAUSE
>
> All disputes from time to time arising out of this contract, shall, unless the parties agree forthwith on a single arbitrator, be referred to the final arbitrament of two arbitrators carrying on business in London who shall be Members of the Baltic and engaged in the Shipping and/or Grain Trades, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire. Any claim must be made in writing and Claimant's Arbitrator appointed within three months of final discharge, and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred. No award shall be questioned or invalidated on the ground that any of

> the Arbitrators is not qualified as above, unless objection to his acting be taken before the award is made.

During the voyage, the plaintiffs-appellants became the holders-in-due-course of the bills of lading, (A5). As such, they became bound by all the terms, conditions and exceptions contained in those bills of lading as did the defendants-appellees by the signature of their agent.

By Notice of Motion (A14) the defendants-appellees moved the lower court, Honorable Kevin Thomas Duffy, for an order staying the lawsuit pending arbitration pursuant to Section 3 of the Federal Arbitration Act, Title 9 U.S.C., Clause 10 of the bills of lading and the charter party designated therein. The motion was made with an accompanying memorandum of law, and an opposing memorandum of law was also submitted. On June 22, 1976 Judge Duffy reached the following decision: (A20)

> "Motion to stay this cause pending arbitration is granted. The bills of lading specifically incorporated the arbitration provisions of the charter. The argument that the arbitration may be time-barred is to be resolved by the arbitrators. The matter is to be transferred to the Suspense Docket. It is so ordered."

The plaintiffs-appellants seek to have the decision of Judge Duffy reversed on this appeal.

POINT I

This appeal must be dismissed as a stay of proceedings pending an arbitration in an admiralty matter is not a final order or an injunction from which an appeal may be taken.

The jurisdictional basis for the United States Court of Appeals for the Second Circuit to hear and decide an appeal is statutorily established at Title 28 of the United States Code at §1291 and §1292:

§1291. *Final decisions of district courts*

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

§1292. *Interlocutory decisions*

> (a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps

to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involved a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

It has been ordered by the Honorable Kevin Thomas Duffy (A20) that this lawsuit be stayed pending arbitration, and that the matter be transferred to the Suspense Docket. This lawsuit has neither been discontinued nor dismissed. No final decision of the District Court has been rendered. The order staying this lawsuit is merely a calendar order issued under the Court's inherent power to regulate the administration of its own business. This is an appeal from an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Pro-

cedure. The plaintiffs-appellants can not appeal this Order of the lower court.

In the case of *Bernardo Penoro* v. *Rederi A/B Disa and Vessel Disa etc.*, 376 F2d 125 (2 Cir. 1967), cert. denied 389 U.S. 852 (1967), a longshoreman commenced a lawsuit against a vessel owner for personal injury while unloading a vessel owned by defendant, Rederi A/B Disa. The vessel owner, in turn, impleaded Cunard Steamship Company Ltd., the charterer of the vessel, and as it also happened, the stevedore employer of the plaintiff, for indemnity for breach of its warranty of workmanlike service, as a stevedore. Cunard Steamship Company, Ltd. moved the United States District Court for the Southern District of New York for an order staying the impleader action under the Arbitration Clause of the charter party with Rederi A/B Disa. Under its terms Cunard was responsible for arranging and paying for the loading and unloading of the vessel and decided to do its own stevedoring in New York. The Honorable Thomas F. Murphy granted the motion and from his order the defendant, vessel owner, appealed.

This Court carefully reviewed the appealability from such an order and dismissed the appeal. It was held that the order was interlocutory and not final, and also that it was not an interlocutory order appealable under 28 U.S.C. §1292(a) (1), supra. This Court stated at page 128:

> "Whether or not a stay of court proceedings is an 'injunction' within the meaning of §1292(a) (1) has depended on what proceedings are stayed by what court. The general principle is that where a court stays a proceeding on its own docket, that is not an injunction but merely a calendar order issued under the court's inherent power to regulate the administration of its own business. On the other hand, where a court stays a proceeding in another court, that stay is considered to

be an injunction. Traditionally, only a court of equity could stay proceedings in another court."

This Court went on further to consider orders by courts in Admiralty granting or denying stays of proceedings before them and stated at pages 129 and 130:

"Orders by courts in admiralty granting or denying stays of proceedings before them have been spared the confusion of Enelow-Ettelson-Morgantown-Baltimore Contractors. Such orders have consistently been held not to be injunctions within the meaning of §1292(a) (1) even if based on equitable defenses or counterclaims. In Schoenamsgruber v. Hamburg American Line, 294 U.S. 454, 55 S.Ct. 475, 79 L.Ed. 989 (1935), decided the same term as Enelow, a court in admiralty had stayed proceedings before it pending arbitration between the parties. Despite the similarity to the Shanferoke case, the Supreme Court held that admiralty courts had the power, without need to resort to the aid of equity, to delay actions before them pending the outcome of some other proceedings. Such an order was not one issued by equity and therefore not appealable. This court has consistently followed the holding of Schoenamsgruber. Moran Towing & Transportation Co. v. United States, 290 F.2d 660 (2 Cir., 1961); Solomon v. Bruchhausen, 305 F.2d 941 (2 Cir. 1962); Lowry & Co. v. SS LeMoyne D'Iberville, 2 Cir., 372 F.2d 123, January 21, 1967 [proceedings stayed pending foreign arbitration]."

The plaintiffs-appellants (at page 2 of their brief) concede that "This is a case in Admiralty and Maritime Law. . ." and this is also alleged in their complaint (A4).

This court stated at page 131 of the *Bernardo Penoro* decision, supra:

> "Stays of the kind with which this case is concerned are merely calendar orders. They do no more than delay proceedings; in the great majority of cases they do not, *in practical effect*, determine substantial rights of the parties or cause irreparable harm. They demonstrate no crying need for an exception to the final judgment rule. See Moore Federal Practice (2d ed. 1966) ¶39.13[1]." (Emphasis Added)

We submit this is dispositive of the appeal here.

In the case of *Lowry & Co., Inc.* v. *S.S. Le Moyne D'Iberville*, 372 F. 2d 123 (2 Cir. 1967), decided just four months prior to *Penoro*, supra, an endorsee of bills of lading for a sugar cargo libeled the vessel for damage to the cargo. The vessel owner moved for a stay of the lawsuit pending arbitration pursuant to the provisions of the charter party incorporated by reference in the bills of lading. The Honorable Edward Weinfeld granted the motion and ordered a stay of the lawsuit pending arbitration.

The plaintiff, bills of lading endorsee, appealed. This Court dismissed the appeal, stating at pages 123 and 124:

> "Both parties urge us to hold this order appealable. Libelant seeks reversal of the order for stay, impliedly ordering arbitration, and respondent, although it filed no cross appeal, seeks to narrow the scope of the arbitration. We find it impossible to reach the merits because of the limitations on our appellate jurisdiction, and must dismiss the appeal. 28 U.S.C. §1291 grants us jurisdiction over final decisions of the district courts. 28 U.S.C. §1292(a) (3) grants us jurisdiction over appears from 'Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases

in which appeals from final decrees are allowed.' Neither of these provisions by its terms covers the instant appeal, and the courts have consistently given them a narrow construction. Federal policy, as distinguished from that followed by some state judicial systems, is against piecemeal appeals. Switzerland Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23, 87 S.Ct. 193, 17 L.Ed. 2d 23 (1966); Chappell & Co. v. Frankel, 367 F.2d 197 (2 Cir. 1966). An order staying an admiralty action in the district court pending arbitration is not a final order and is not appealable. Schoenamsgruber v. Hamburg American Line, 294 U.S. 454, 55 S.Ct. 475, 79 L.Ed. 989 (1935). The parties are still before the court and further proceedings may be moved after the arbitrators have acted. See Armstrong-Norwalk Rubber Corp. v. Local Union No. 283, 269 F.2d 618 (2d Cir. 1959); Stathatos v. Arnold Bernstein SS Corp., 202 F.2d 525 (2d Cir. 1953); Postal SS Co. v. International Freighting Corp., 133 F.2d 10 (5th Cir. 1943); Seaboard & Caribbean Transport Corp. v. Hafen-Dampfschiffahrt A.G., 329 F.2d 538 (3rd Cir. 1964); Diacon-Zadeh v. Denizyollari et al., (The Yozgat et. al.), 196 F.2d 491 (3rd Cir. 1952); Chatham Shipping Co. v. Fertex Steamship Corp., 352 F.2d 291, 294 (2d Cir. 1965). Where the final relief sought is an order to proceed to arbitration under Section 4 of the Arbitration Act or 301(a) of the Labor Management Relations Act, the order is final and appealable. Farr & Co. v. Cia, etc., 243 F.2d 342 (2d Cir. 1957); Goodall-Sanford, Inc. v. United Textile Workers of America, AFL Local 1802, 353 U.S. 550, 77 S.Ct. 920, 1 L.Ed. 2d 1031 (1957). In the case at bar, however, the final relief sought by libelant was money damages, not arbitration, which was demanded in the answer. The stay has held up the proceedings, but as stated, the

parties are still before the court, which can meet the problems of further proceedings as they arise."

Accordingly, this appeal is on all fours with these two recent holdings of this Court, supra. We respectfully submit the appeal must be dismissed.

POINT II

Appellees have the right to demand arbitration of the claim of the appellants pursuant to the terms and conditions of their contract, the bills of lading.

Plaintiffs-appellants mistakenly argue that the defendants-appellees have no standing to demand arbitration on the grounds that appellants are not a signatory to the Charter Party based on *Instituto Cubano de Estabilizacion del Azucar* v. *T/V GOLDEN WEST,* 264 F. 2d 802 (2 Cir. 1957) and *Amstar Corporation* v. *Vasalem Shipping Corp.,* 75 Civ. 4895.

In each of these cases the factual situation was somewhat similar but not the same as in the case before the Court now and is easily distinguishable. In those cases a shipowner had chartered a vessel to a disponent owner, or time charterer, who had in turn sub-chartered the vessel for a voyage on which a bill of lading was issued for the carriage of cargo. In each of those cases the terms and conditions of the sub-charter, including the arbitration clause, were incorporated on the face of the contract. Set forth for the Court's review is a comparison of the clauses referred to in these two cases as well as the one presently in point.

In the matter of the T/V GOLDEN WEST, the clause read as follows:

"This shipment for carriage under and pursuant to the terms of the Charter dated April 17, 1952 at

between Transocean Shipping and Trading Company and Instituto Cubano de Estabilizacion del Azucar as charterer, and all the terms whatsoever of the said charter except the rate and payment of the freight specified therein apply to and govern the rights of the parties concerned in the shipment."

In the case of the S.S. NAASHI the particular clause read as follows:

"Subject to all the terms, provisions, and conditions of BULK SUGAR CHARTER PARTY—U.S.A. (April 1962) dated at New York, 6th, September 1, [*sic*] 974."

The particular clause now before the Court reads as follows:

"All terms, conditions, and exceptions as per charter party dated London December 18, 1972 *to be considered as fully incorporated herein.*" (Emphasis Added)

Clearly, the clause incorporating the charter party dated December 18, 1972, in the bills of lading, in this case, is far stronger than those contained in the cases cited.

Clearly, the defendants-appellees became bound by all the terms and conditions both in the printed form as well as those added to these bills of lading, when they were signed by Lavin Shipping Company, as agents for the master. The plaintiffs-appellants were clearly bound in a similar manner when they became holders-in-due-course of the bills of lading. The Honorable Kevin Thomas Duffy found this to be so and ruled on the motion that "the bills of lading specifically incorporated the arbitration provision of *the charter.*" (Emphasis Added).

More importantly, even if the clause incorporating the charter party intent December 18, 1972 were not present on

the face of either bill of lading, the defendants-appellees and the plaintiffs-appellants could, each require of the other arbitration of any claim. Such demand for arbitration is clearly provided for in each of the *bills of lading* at clause 10 which states:

> "All terms, conditions and provisions of the Strike, Lighterage Clause No. 26 and *Arbitration Clause* of the 'Centrocon' Charter Party is to apply." (Emphasis Added)

Such clauses as they appear in the printed form of the bills of lading contracts are recognized as valid by the Federal Arbitration Act Title 9 U.S.C. Section 2, as written provisions evidencing a maritime transaction involving commerce which is to be settled by arbitration. Federal Arbitration Act, Title 9 U.S.C. Section 2 states:

> §2 *Validity, irrevocability, and enforcement of agreements to arbitrate*
>
> "A written provision in any *maritime transaction* or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The term maritime transaction is defined in the Federal Arbitration Act at Title 9 U.S.C. Section 1 as follows:

§1 *"Maritime transactions"* and *"commerce" defined; exceptions to operation of title*

"Maritime transactions", as herein defined, means charter parties, *bills of lading of water carriers, . . .*" (Emphasis Added)

See also §3569, *Federal Practice and Procedure,* Wright, Miller and Cooper, 1975, page 467.

The case of the *T/V GOLDEN WEST,* supra, which is relied on most heavily by the plaintiffs-appellants, revolves about the lower court decision of Judge Bicks, 128 F. Supp. 754, (U.S.D.C., S.D.N.Y.) denying the motion to compel arbitration.

The United States Court of Appeals for the Second Circuit heard arguments on appeal based on the order of Honorable Thomas F. Murphy of the United States District Court for the Southern District of New York, not reported, dismissing the plaintiff's complaint as being time-barred under the United States Carriage of Goods by Sea Act 46 U.S.C. §1303(6).

Judge Bicks determined that because the named defendant was not a signatory to the charter party referred to on the face of the bills of lading involved, the defendant, shipowners, could not be compelled by the cargo plaintiffs to arbitrate their claim. However, it should be pointed out that Judge Bicks gave careful consideration to the facts before him and specifically made a finding of fact as follows, at page 755:

"The bills of lading *do not contain an arbitration clause;* the charter referred to in the bills of lading does." (Emphasis Added)

Judge Bicks was saying that absent the reference to the charter party in the bills of lading before him there could be no question of whether a demand for arbitration could be made, and, that, regardless of the inclusion of the reference to the charter party, if the bills of lading themselves contained a clause calling for arbitration, his decision would have to be clearly different. Also, in the case of the S.S. NAASHI, supra, there was no indication that Judge Frankel had before him any bills of lading which contained their own requirements for arbitration of claims.

The plaintiffs-appellants, in their brief, characterized the bills of lading as "charter party bills of lading." This characterization is clearly facetious, as no such fact has been adduced.

The bills of lading issued herein contain not only the strongest language, incorporating the terms, conditions and exceptions of a particular charter party, but, in addition, *by their own force and effect* require, at Clause 10, that all terms, conditions, and provisions of the Arbitration Clause of the 'Centrocon' charter party are to apply.

A comparison of the terms of the Centrocon form of arbitration clause and the arbitration clause contained in the charter party referred to on the face of the bills of lading shows that they are *one* and the *same form* of arbitration clause.

Therefore, because of the terms of the incorporated charter party, as appears on the face of the bills of lading, and also in addition because of the application of Clause 10 of the bills of lading, the appellants and appellees may require that any claims between them be put to arbitration, at the place and by the terms stated therein. Each party is subjected to, and receives no greater benefit than he had contracted for.

The defendants-appellees have the right to demand arbitration. The lower court found that this right exists. Accordingly, the decision staying the lawsuit pending arbitration must be affirmed.

POINT III

The United States Court of Appeals should not hear on appeal an argument which was not presented to the lower court for decision.

For the first time, on appeal, the plaintiffs-appellants argue that one of the named defendants-appellees is not entitled to demand arbitration under the applicable bills of lading. This point was never raised before Judge Duffy.

The plaintiffs-appellants state in their appellate brief (page 12), the owners of the M.V. HOLENDRECHT are N.V. Stoomvaart Maatschappij De Maas and that while Phs. Van Ommeren, N.V. "most probably owns and controls the listed owner", it is merely a managing agent of the vessel. As a managing agent, the plaintiffs-appellants now belatedly assert for the *first* time on appeal, that this defendant-appellee is, therefore, not entitled to demand arbitration under the terms and conditions of the bills of lading sued upon.

Plaintiffs-appellants, having raised this argument for the first time on appeal, have absolutely no right to pursue this argument.

In *Jean T. Terkildsen* v. *Eric H. Waters*, 481 F. 2d 201 (2 Cir. 1973), plaintiffs, after trial, received a judgment which awarded pre-judgment interest. It was not until the appeal was taken that the defendants opposed the awarding of pre-judgment interest. This Court determined that such an argument not raised below would not be heard by

the United States Court of Appeals for the Second Circuit. Specifically, this Court stated at pages 204-205:

> "It is true that defendants' proposed findings took the position that a net judgment should be entered in their favor because plaintiff owed them more than they owed her, but the issue of pre-judgment interest for plaintiff was nowhere mentioned. Far more significantly, following the judge's opinion directing that pre-judgment interest be included in plaintiff's recovery, counsel for defendants sent Judge Bonsal a letter accompanying a proposed judgment, in which a method for computation of plaintiff's pre-judgment interest at six per cent was detailed. At no point in this letter, nor at anytime thereafter, did defendants challenge the award to plaintiff of pre-judgment interest on the ground that they had exercised their right to offset, though they might have done so even after judgment was entered by a motion under Fed. R. Civ. P. 59(e). Cf. Gilroy v. Erie-Lackawanna R.R., 44 F.R.D. 3 (S.D.N.Y. 1968).
>
> Under these circumstances, we see no reason to depart from the general rule of practice which forecloses appellate consideration of issues not raised below. See, e.g., Hormel v. Helvering, 312 U.S. 552, 556, 61 S.Ct. 719, 85 L.Ed. 1037 (1941). Adherence to the rule is particularly apt where, as here, factual questions may have been implicated as to which the judge made no findings because the issue was not directly raised and equally, where considerations underlying a subtle legal issue could have been exposed and distilled by the able district judge so as to facilitate more informed consideration by this court."

See also, *Mary A. Schwartz* v. *S.S. NASSAU,* 345 F.2d 465 (2 Cir. 1965); *United States of America* v. *Vitasafe*

Corporation, 352 F. 2d 62 (2 Cir. 1965); *Maurizio D. Fortunato* v. *Ford Motor Company*, 464 F.2d 962 (2 Cir. 1972); and; the *Ansul Company* v. *Uniroyal Inc.*, 448 F. 2d 872 (2 Cir. 1971).

In addition to the fact that plaintiffs-appellants raised for the first time on appeal a new argument, it is only plaintiffs-appellants who are confused as to the ownership-management of the M.V. HOLENDRECHT (page 12 of plaintiffs-appellants brief).

In the answer of the defendants-appellees to the complaint of the plaintiffs-appellants it is clearly stated (A8):

> ". . . that they owned and operated the M.V. HOLENDRECHT in the carriage of merchandise by water for hire between the ports of Philadelphia, Pennsylvania and Hull, England among others . . ."

The plaintiffs-appellants argue that since one of the defendants-appellees had acted as the managing agent for the vessel during the period of time in question its status as owner is diminished by performing this service. This is, wholly, contrary to the findings of this court in the matter of *Bernardo Penoro* v. *Rederi A/B Disa*, supra. In that case the third-party defendant, Cunard Shipping Company, Ltd., was found to be not only the charterer of the vessel, but had also elected to perform the stevedoring functions for the venture at New York. The Court's decision is clear that the status as charterer, pursuant to which they could demand arbitration with the vessel owner, was in no way diminished by the fact that they had also been the stevedores.

The complaint of the plaintiffs-appellants alleges that the M.V. HOLENDRECHT was unseaworthy at the commencement of the voyage in question. There is no factual proof that if the alleged unseaworthiness be found to be

true, that such was the result of the negligence of the defendant-appellee, Phs. Van Ommeren, N.V. Such a factual determination, regarding not only potential negligence, but also ownership status should have been presented to Judge Duffy in determining the motion to stay this lawsuit pending arbitration. No such factual proof of these allegations was presented to the lower court. In fact, a differentiating status of the owner managing agent so as to abrogate its right to demand arbitration under the bills of lading was never placed before Judge Duffy. This is for the arbitrators.

Of course, if the arbitrators should determine that the vessel was in fact seaworthy before and at the time of the voyage, the claim of the plaintiffs-appellants would fall completely.

As both defendants-appellees admit ownership of the M.V. HOLENDRECHT and if this Court determines on the merits that the order of Judge Duffy staying this lawsuit pending arbitration is correct, then, the appeal of the plaintiffs-appellants to reverse the order of Judge Duffy should also fall.

POINT IV

The interpretation of the arbitration clause contained in the bills of lading is to be resolved by the arbitrators.

The Honorable Kevin Thomas Duffy stated in his order that "the argument that the arbitration may be time-barred is to be resolved by the arbitrators".

The plaintiffs-appellants instead propose that this Court interpret the 'Centrocon' arbitration clause. They assert, by a novel proposition, that this particular clause contained in the bills of lading had expired.

It is to be assumed that by the use of the word expire, that plaintiffs-appellants charge the defendants-appellees with having waived their right to demand arbitration.

The plaintiffs-appellants urge this Court to follow *Sucrest Corporation* v. *Chimo Shipping*, 236 F. Supp. 229 (S.D.N.Y. 1964) as purported authority for a proposition that the defendants-appellees have waived their right to demand arbitration.

In the *Sucrest* case, supra, the plaintiffs had commenced suit to recover for alleged damage to a shipment of molasses carried aboard the S.S. VALNOR from Barbados to New York. The charter party between the plaintiff and defendant required that any dispute between the parties be submitted to arbitration within six months of the completion of discharge. The shipowner sought summary judgment dismissing the plaintiff's claim on the grounds that they had failed to demand arbitration within the prescribed period of time and had therefore waived their right to arbitrate and their claim became time-barred. The court denied the vessel owner's motion for summary judgment, as it found the defendants had been similarly dilatory.

The defendants-appellees have never sought to have the claim of the plaintiffs-appellants dismissed. The defendants-appellees have promptly requested of Judge Duffy an order staying the lawsuit pending the outcome of an arbitration, pursuant to the terms and conditions of the bills of lading sued upon, which was granted.

A careful reading of the 'Centrocon' arbitration clause reveals no indication, either implicit or explicit, that at any time the right of either party to demand arbitration expires.

In the case of *Lowry & Company Inc.* v. *S.S. Le Moyne D'Iberville*, 253, Fed. Supp. 396 (U.S.D.C., S.D.N.Y. 1966)

Aff'd 372 F. 2d 123 (2 Cir. 1966), Judge Weinfeld dealt with the question of whether or not a vessel owner could compel the transferee of bills of lading to arbitrate any claim the transferee may have for alleged cargo damage, pursuant to a 'Centrocon' arbitration clause, (see footnote 1, page 397).

It was argued by the plaintiff transferee that the respondent had no right to demand arbitration as it had not made a demand for arbitration within the three month period provided in the clause.

Judge Weinfeld stated at page 400 as follows:

> "Finally, libelant, relying upon Sucrest Corp. v. Chimo Shipping Ltd., contends that respondent waived its right to arbitration when, aware of libelant's claim, it failed to demand arbitration within the three-month period provided in the centrocon clause, assuming arguendo that the clause governs. The contention, as the court understands it, is that even though libelant failed to follow up the assertion of its claim by demanding arbitration and appointing its arbitrator, nonetheless respondent was required to do so and unless it did, it was foreclosed from that remedy. *Apart from this court's doubt that a party is under an obligation to initiate proceedings when it asserts no claim,* our Court of Appeals has recently held that an issue of waiver, such as is here presented, is to be decided by arbitrators rather than by the court. Accordingly, the claim of waiver is also reserved for the arbitrators." (Emphasis Added)

See also *World Brilliance Corp.* v. *Bethlehem Steel Company,* 342 F.2d 362 (2 Cir. 1965) and cases cited therein.

Further in the case of *Kurt Orban Company* v. *S.S. CLYMENIA,* 318 F. Supp. 1387 (U.S.D.C., S.D.N.Y. 1970)

Judge Tenney had before him a problem concerning the claim of purchasers of bills of lading for alleged cargo damage against a vessel owner and time-charterer, within the context of a 'Centrocon' form of arbitration clause.

In that case, the defendant, vessel owner, moved for summary judgment dismissing the plaintiffs' claim on the grounds that they had failed to invoke the arbitration clause within the period of time specified, and in the alternative for a stay pending arbitration. The Court refused to grant summary judgment but with respect to the three months limitation period of the arbitration clause, it stated at pages 1390-1391:

> "... the issue of laches or the effect of whatever limitation period is found to be applicable would appear to be for the arbitrators and not the court. . ."

See also *Application of Reconstruction Finance Corp.*, 106 F. Supp. 358 (U.S.D.C., S.D.N.Y., 1952); *United States of America* v. *Cia. Naviera Continental S.A.*, 202 F. Supp. 698 (U.S.D.C., S.D.N.Y., 1962); and *Trafalgar Shipping Co.* v. *International Milling Co.*, 401 F. 2d 568, 571 (2 Cir. 1968).

The interpretation of the arbitration clause with respect to waiver, laches, or time-bar is a matter to be resolved by the arbitrators.

The order of Judge Duffy should be affirmed.

CONCLUSION

The appeal of the plaintiffs-appellants is not based on an order which is appealable, under the statutes governing appeals to the United States Court of Appeals for the Second Circuit and should be dismissed. The order of Judge Duffy, of the United States District Court for the Southern District of New York, staying this lawsuit pending arbitration, on the merits, should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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TRADAX LIMITED, et al

Plaintiffs-Appellants,

- against -

M.V. "HOLENDRECHT", her engines, boilers, tackle, etc.,

- and against -

N.V. STOOMVAART MAATSCHAPPIJ DE MAAS and PHS. VAN OMMEREN, N.V.,

Defendants-Appellees.

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CERTIFICATE OF SERVICE
OF BRIEF

WE HEREBY CERTIFY that two copies of the attached brief were this date served by mail on the following:

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October 15, 1976

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